



In The  
**Supreme Court of the United States**  
October Term, 1976

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No. 76-705

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THE SCHOOL DISTRICT OF OMAHA,  
STATE OF NEBRASKA, et al.,  
*Petitioners,*  
vs.  
UNITED STATES OF AMERICA,  
and  
NELLIE MAE WEBB, et al.,  
*Respondents.*

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**PETITIONERS' REPLY BRIEF**

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In response to the Briefs in Opposition of the Re-  
spondents, the Petitioners ask this Court to consider the  
following:

—o—  
**ARGUMENT**

**I.**

The appropriate standard for determining in-  
tentional segregation.

1. Both Respondents argue that the Petition should  
be denied on the first issue raised by the Petitioners [here-

inafter, the "School District"] because the Eighth Circuit standard is appropriate and consistent with this Court's decisions. The issue of the appropriate standard for determining intent to segregate in the public schools has, in fact, never been resolved by this Court.<sup>1</sup> Moreover, this Court's recent reexamination of the standard for determining discriminatory intent in employment<sup>2</sup> and housing<sup>3</sup> definitively implies that the Eighth Circuit standard is erroneous. Now is the time for this Court to decide the issue and this is the case, for the following reasons:

- (i) The issue of the appropriate standard for determining intentional segregation in the first instance in a school desegregation case is clearly presented by this case since the use of contrasting legal standards by the District Court and by the Eighth Circuit produced contradictory conclusions on the presence of such intent.
- (ii) Despite both Respondents' attempts to wish it away, the circuit courts have long struggled with this vital issue and are in deep conflict over it.<sup>4</sup>
- (iii) This is the single most important question in school desegregation litigation because its resolution will substantially affect the ultimate outcome of all

1. The impact, novelty, and controversial nature of the foreseeable effects presumption of this case have recently been recognized in Note, *Intent to Segregate: The Omaha Presumption*, 44 Geo. Wash. L. Rev. 775 (1976).

2. *Washington v. Davis*, 426 U. S. 229 (1976).

3. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 45 U. S. L. W. 4073 (U. S. Jan. 11, 1977).

4. The presence and significance of this conflict in the circuits has been noted. 44 Geo. Wash. L. Rev., *supra*, note 1, at 796 n. 153, 803.

such litigation and concomitantly determine the appropriate role for the federal courts in examining decisions on educational policy traditionally committed to the discretion of the political branches of the government.

(iv) This Court's recent clarification of the law regarding intentional discrimination will not alone settle the law regarding intentional discrimination in the public schools unless this Court itself speaks because the lower courts are deeply divided on this issue and because the Eighth Circuit's decision is now the leading opinion for one side in this conflict and the Eighth Circuit itself has found nothing to the contrary in *Washington v. Davis*.<sup>5</sup>

(v) The standard utilized by the Eighth Circuit is in clear conflict with this Court's decisions in *Washington v. Davis*, *Village of Arlington Heights*, and *Mt. Healthy City School District v. Doyle*.<sup>6</sup> The facts presented by this case are typical of those involved in most current school desegregation litigation, and therefore, a decision in this case would have broad application.

2. The Respondent United States takes the position that this Court should deny the Petition "forthwith",

5. The Eighth Circuit summarily concluded in its latest opinion that *Washington v. Davis* contained "nothing . . . that would cause us to revise our earlier opinion." (App. p. 173-74). Compare the differing reactions of the Seventh Circuit in *Armstrong v. Brennan*, 539 F.2d 625, 633-34 (7th Cir. 1976) and *United States v. Board of School Commissioners of City of Indianapolis*, 541 F.2d 1211 (7th Cir. 1976).

6. 45 U. S. L. W. 4079 (U. S. Jan. 11, 1977).



whereas in two other recent school desegregation cases before this Court it has urged that the writ be granted.<sup>7</sup> The United States was in a position to readily urge that this Court grant the writ in both the Austin and Indianapolis cases since both of those courts of appeals espoused a legal position which the United States had never advanced at any stage of either litigation. By contrast, the United States here stands before this Court not as an objective advisor, but as an advocate defending a legal position which it has espoused in this case from the very beginning and which has now proven to be contrary to this Court's recent decisions on discrimination in employment and housing. Given this stance of the United States, this Court should not give undue weight to its position.

3. The lack of objectivity by the Respondent United States is most evident in its unsupportable assertion that the Eighth Circuit "anticipated and applied" the standard articulated by this Court in *Village of Arlington Heights* for determining whether racial considerations were a "motivating factor" in the School District's decisions. U. S. Brief at p. 6. The Eighth Circuit standard is clearly inconsistent with this case.

This Court in *Village of Arlington Heights* and the companion case of *Mt. Healthy City School District* held that a plaintiff alleging an unlawful purpose must bear the initial burden of proving that such a purpose was a motivating factor in the challenged official decision. Once the plaintiff satisfies this initial requirement, the burden

7. See U. S. Brief in *Austin Independent School District v. United States*, No. 76-200, and *Metropolitan School District of Perry Township v. Buckley*, No. 76-212.

then shifts to the defendant to prove by a preponderance of the evidence that it would have made the same decision even in the absence of the improper motive. Furthermore, this Court in *Village of Arlington Heights* defined how the plaintiff must meet its burden. Disproportionate impact on minority racial groups is not alone sufficient to establish a prima facie case of discriminatory purpose unless the impact was as stark as that found in *Gomillion v. Lightfoot*<sup>8</sup>, or *Yick Wo v. Hopkins*.<sup>9</sup> The plaintiff must establish the existence of discriminatory purpose from such factors as the historical background of the challenged decision, the specific sequence of events leading up to the decision, the existence of any procedural or substantive departures from normal practice, and the legislative or administrative history of the particular decision.

Under the Eighth Circuit standard, on the other hand, the plaintiff need only prove that the foreseeable effect of an act or omission is to bring about or maintain segregation. This completely states the burden on the plaintiff. There is no requirement that the plaintiff in any way, let alone in the manner prescribed in *Village of Arlington Heights*, attempt to show the motivation behind the actions taken by the defendant. This burden is entirely on the defendant, and it must show that it was in no way motivated by an unlawful purpose. Moreover, the Eighth Circuit standard requires a finding of liability if the presumed improper purpose partially motivated the action in question. Proof that the decision would have been the same had the improper motive not been present is irrelevant.

8. 364 U. S. 339 (1960).

9. 118 U. S. 356 (1886).

Thus, the Eighth Circuit standard conflicts with *Village of Arlington Heights* and *Mt. Healthy City School District* by relieving the plaintiff of its initial burden to show that segregative intent was at least one of the motivating factors for the decision; by placing the burden of intent solely on defendants; and by taking from the defendant the defense that it would have acted the same in the absence of the improper motive.

4. In their haste to subsume the Eighth Circuit's standard under the law developed by this Court in *Washington v. Davis* and *Village of Arlington Heights*, both Respondents avoid consideration of the standard employed by the District Court in this case. There can be no doubt that the District Court placed the burden of explanation on the Respondents in this case as required by this Court in *Washington v. Davis*, *Village of Arlington Heights*, and *Mt. Healthy City School District*.

The Eighth Circuit originally reversed the District Court, not because its findings of fact were clearly erroneous under the standard of law employed by the District Court, but rather because, in the Eighth Circuit's view, the District Court employed an improper standard of law to determine the existence of intentional segregation. Both Respondents cite excerpts from the record before the lower court in support of the ultimate conclusion of the Eighth Circuit. The citations are to conclusory facts drawn by the Eighth Circuit only because it employed the legal standard which is in issue before this Court. The District Court arrived at contrary conclusions because its inquiry utilized the appropriate burden of proof and was sensitive to the historical context in which the School District's actions were taken.

The dispute before this Court is not one of fact. From the very beginning of the appellate litigation in this case, the thrust of Respondents' argument has been that the District Court employed an incorrect legal standard.<sup>10</sup> In this case, the standard of law for determining the existence of intentional segregation is determinative. Therefore, it clearly presents for this Court the question of what standard is appropriate for determining the existence of intentional segregation in the first instance in a school desegregation case.

5. One brief illustration from the facts in this case clearly shows the difference between the standard recently articulated by this Court, which the District Court employed, and the Eighth Circuit standard.

In examining the School District's policies with respect to Technical High School, the District Court focused on their historical context (App. pp. 67-74). It noted that both the joint attendance zone with Central High School and Technical's open enrollment status were policies which were in effect from the very beginning of the school district, before 1900. It noted that the special education programs at Technical High School were set up specifically to serve students who were already in attendance at

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10. "The decisions in *Omaha I* and *II* total 67 pages. They are full of facts. Accordingly, the applicability of the 'clearly erroneous' standard, Rule 52A, Federal Rules of Civil Procedure, must be addressed. Given our approach, Rule 52 is not a major factor. The thrust of our argument is not that the District Court made erroneous findings, but that it 'applied' . . . incorrect legal standards in addressing (the) contention that respondent School Board engaged in an unconstitutional policy of deliberate segregation. . . ." Brief for Appellant-Intervenors at 5, *United States v. School District of Omaha*, 521 F. 2d 530 (8th Cir. 1975).



Technical. It found that course changes at Technical were made specifically in response to student demands. It looked at the total composition of the Technical High School faculty and found it to be a substantially integrated faculty, 85.4% white and 14.6% black (App. p. 91).

In contrast, the Eighth Circuit (App. pp. 124-29) paid no attention to the long standing character of attendance policies with respect to Technical High School. It focused merely on the large number of special education students at Technical High School and not on how those students came to attend Technical. It noted course changes at Technical but gave insufficient recognition to the reasons for those changes. It focused on the black high school teachers at Technical High School as a percentage of the total black high school faculty in the school district, rather than as a percentage of the faculty at Technical. Finally, the Eighth Circuit paid no attention whatsoever to Technical's traditional character as a vocational education school or to the decline of interest in vocational education as a phenomenon during the 1960's.<sup>11</sup>

Further contrast between the two courts' approaches to fact-finding on the question of intent to segregate because of the difference in law applied are noted in the School District's original Petition, No. 75-270, pp. 7-16.

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11. Both Respondents and the Eighth Circuit assert that Technical High School is situated in a white neighborhood, giving the impression that this location makes its then nearly all black racial composition much more difficult to explain. The fact is that this mischaracterizes the location of Technical in that it is located on the south side of the street whose north side forms the southern border of a substantial predominantly black community in Omaha. Its joint attendance zone with Central High School encompasses and has long served a large portion of this immediately adjacent black neighborhood.

## II.

### The appropriate scope of remedies in school desegregation cases.

1. It is the entire thrust of this second issue raised in the School District's Petition that desegregation remedies ordered by the lower federal courts in general, and this remedy in particular, do not conform to the traditional limitations on equitable remedies applied by this Court in *Milliken v. Bradley*, 418 U.S. 717 (1974), and further refined by three Justices of this Court in *Austin Independent School District v. United States*, 45 U.S.L.W. 3413 (U.S. Dec. 6, 1976).

This is the first time the School District has placed this issue before this Court.

The starting point for any consideration of this question must be the fact that Omaha, like other large cities in this country, has long had racially imbalanced neighborhoods and this imbalance has caused racial imbalance in its schools which have had a neighborhood assignment policy since the beginning of the school district. However, even if it were assumed that the actions faulted by the Eighth Circuit were violative of the Constitution and caused some further racial imbalance not attributable to racially imbalanced neighborhoods, it is nonetheless patent that the remedy the Eighth Circuit imposed was not in fact tailored to the wrong it perceived.

The Respondent United States agrees with the School District that the appropriate standard for assessing remedial orders in school desegregation cases is whether those remedial orders place the school system and its stu-

dents where they would have been but for the violations of the Constitution. The United States simply takes the position that this case is not appropriate for the enunciation of this standard of law because the remedy imposed by the Eighth Circuit is tailored to the violation.

The United States is clearly wrong.

First, no careful reading of the Eighth Circuit's original opinion in this matter setting forth the guidelines within which a remedy was to be developed indicates any concern for tailoring the remedy to the scope of racial separation in fact caused by the actions of the School District.<sup>12</sup>

Second, the record clearly reflects that the remedy guidelines imposed by the Eighth Circuit require the elimination of racial separation in no way attributable to the actions which the Eighth Circuit found violative of the Constitution. It does so because (i) of the 16 schools which, up to the time of trial, were greater than 50% black, 7 were already predominantly (65% or greater) black and an additional 5 were already majority black before any of the variations in the neighborhood school

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12. In fact, as originally announced, the Eighth Circuit guidelines required racial balance in all of the schools in the School District within a range of plus or minus 15% from the racial composition of the School District as a whole (App. pp. 130-31), a remedy identical to that required by the Sixth Circuit in *Brinkman v. Gilligan*, 539 F.2d 1084 (6th Cir. 1976), cert. granted 45 U. S. L. W. 3485 (U. S. Jan. 17, 1977). The 35% maximum on black enrollment was modified *sua sponte* to 50% by the Eighth Circuit without any explanation (App. pp. 136-37).

policy ever applied to them,<sup>13</sup> and (ii) the only evidence in the record on the actual effect of these variations once they were applied to these schools indicates that the effects were insubstantial and certainly not of the kind which identified a school as one for blacks only.

Only one of these schools had a faculty greater than 25% black before it turned predominantly black.<sup>14</sup> The open transfer policy altered the percentage of black enrollment at these 16 schools by an average increase of 3.5%.<sup>15</sup> At the elementary level its effect was even less significant, an average increase of 2.9%.<sup>16</sup> The impact of the policies the Eighth Circuit found violative of the Constitution is arguably significant only at Technical High School and Technical Junior High School. But Technical Junior High was closed a year before the trial because of the undesirability of housing junior high school students in a senior high school building and its students reassigned on a strict neighborhood school basis; and Technical High School's percentage of black enrollment has been reduced below 50% exclusively by curriculum reform and an active district-wide student recruitment program on an entirely voluntary basis.

Third, the very theory of the violation urged by the Respondents and accepted by the Eighth Circuit is that

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13. See table in appendix attached to this Reply Brief, Columns I, III, X, XI.

14. *Id.*, Column II.

15. *Id.*, Columns IV-IX. These are the only two years for which there was any evidence in the record on the effect of the transfer policy.

16. *Id.*



the School District refused to mandatorily assign white students to identifiably black schools. This theory is based on the premise that factors other than actions of the School District were responsible for causing those schools to first become racially identifiable as black schools. The Eighth Circuit itself recognized the critical factor causing racially identifiable schools in Omaha—racially identifiable neighborhoods (App. pp. 104, 110 n. 11). The Eighth Circuit found that the cause of racial segregation in the neighborhoods in the City of Omaha was discriminatory policies engaged in by the Omaha Housing Authority (which policies the School District vigorously opposed at the time) and private discrimination in housing. This neighborhood segregation simply superimposed itself on the long established neighborhood school policy of the School District as the black population of Omaha grew dramatically after World War II.

Therefore, the Eighth Circuit's remedy exceeds the scope of any wrong caused by any Constitutional violation by the School District and rather is designed to attempt to eliminate racial imbalance in the schools which existed quite independent of any such violation.

2. The Respondent United States urges that there is no need to hold the School District's petition pending this Court's review of *Brinkman v. Gilligan, supra*. The United States takes this position since in its view the plan approved by the Eighth Circuit would not be invalidated by this Court's acceptance of the arguments of the petitioners in *Brinkman*. In so arguing the United States is clearly wrong because if this Court were to hold that the extent of integration which may be required by a court-ordered plan is limited to that degree of integration which would have

existed had the school authorities not violated the Constitution, then the plan approved by the Eighth Circuit would not be valid in that it requires the elimination of substantial racial separation not in any way caused by actions of the School District. At the very least, this Court should require the Eighth Circuit to review the evidence in light of any standard developed in *Brinkman* for measuring the appropriate scope of desegregation remedies, rather than permit the Respondent United States to effectively decide the question.

However, the most appropriate action would be to grant the writ on this issue also since consideration of this case would give this Court the benefit of an additional, and more typical, set of facts to consider in developing the appropriate standard for school desegregation remedies. The underlying facts in this case are very similar to those in *Brinkman*. Both cases involve allegations of discrimination concerning faculty assignment, construction, optional attendance zones, and transfer policies. *Brinkman* differs from this case, however, insofar as the Sixth Circuit did not use the presumption of segregative intent employed by the Eighth Circuit in finding liability. This difference results in a finding of fewer intentionally segregative acts in *Brinkman*, and thus makes it a starker example of remedial excess than this case. But because this case is more typical of most school desegregation cases and is itself also a clear example of remedial excess, it would be a more appropriate case for this Court to utilize in establishing the proper scope of desegregation remedies within a single school district. Finally, this issue can best be considered concurrently with an examination of the

proper standard for determining the existence of intent to segregate because so often in school desegregation cases, and in this case in particular, an expansive standard which broadly defines liability invariably results in an unjustifiably broad remedy.

Respectfully submitted,

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## APPENDIX

## A. 1

Majority Black Schools	I	II	III	IV	V	VI
	% Black When First Black Teacher Assigned	% Black on Faculty for Year School Turned Predominantly Black (65% or more)	% Black at Time of Initiation of Open Transfer Policy in Spring 1964	1970-71 % Black Before Transfers	1970-71 % Black After Transfers	1970-71 Change in % Black Due to Transfer Policy
<u>Elementary</u>						
Central Park	26%	—	5%	34.80	35.09	.29
Clifton Hill	69	3%	25	65.93	73.00	7.07
Conestoga	95	55	—	91.06	93.16	2.10
Druid Hill	77	0	94	91.51	93.18	1.67
Fairfax	91	0	59	86.48	94.11	7.63
Franklin	44	10	22	82.26	86.86	4.60
Kellom	52	18	74	91.07	91.52	.45
Kennedy	95	0	90	97.62	98.38	.76
Lake	53	7	87	82.30	86.91	4.61
Long	99	0	97	95.43	96.33	.90
Lothrop	82	0	97	94.55	97.46	2.91
Monmouth Park	48	15	35	67.61	67.74	.13
Saratoga	67	0	65	83.05	88.94	5.89
<u>Junior High</u>						
Horace Mann	71	25	88	96.59	99.16	2.57
Technical	61	9	54	78.79	90.30	11.51
<u>High School</u>						
Technical	51	3	51	85.80	86.58	.78

## A. 2

VII	VIII	IX	X	XI
1971-72 % Black Before Transfers	1971-72 % Black After Transfers	1970-71 Change in % Black Due to Transfer Policy	% Black for Year in Which Elementary Feeder School Should First Have Been Assigned According to Eighth Circuit—Year	% Black for That Year Had Such Schools Been Assigned—Schools
43.85	43.29	(.56)		
67.27	77.89	10.62		
92.61	93.67	1.06		
90.37	91.89	1.52		
91.17	91.30	.13		
84.10	88.63	4.53		
87.14	92.13	4.99		
97.23	97.35	.12		
83.05	85.09	2.04		
—	—	—		
93.19	95.54	2.35		
67.15	68.52	1.37		
82.55	87.41	4.86		
93.78	97.85	4.07	71% 1959-60	57% (Sherman & Pershing)
75.10	90.92	15.82	61% 1964-65	57.5% (Saunders)
88.78	90.74	1.96		